80-1826

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ALEXANDER L. STEVAS,
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in the Supreme Court of the United States

DIEGO TRINIDAD,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Max P. Engel, Esq.
1461 N.W. 17 Ave.
Miami, Florida 33125
Telephone: 305/325-1810

COMES NOW the Petitioner, DIEGO TRINIDAD, by and through his undersigned attorney, and pursuant to the Supreme Court Rules petitions this Honorable Court for a Writ of Certiorari in this cause. In support thereof Petitioner states as follows:

1. That Petitioner seeks review of *Trinidad v. State*, 388 So.2d 1063 (Fla. 3d DCA 1980), cert. den. _____ So.2d ____ (Case No. 59,901, decided February 24, 1981).

2. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 1257(3).

A. The Petitioner was convicted of Possession of a Controlled Substance, Cocaine, in violation of Florida Statutes §893.13 on September 26, 1979. The judgment was affirmed by the Third District Court of Appeals on September 16, 1980, rehearing denied on February 22, 1980. Certiorari was denied by the Florida Supreme Court on February 24, 1981.

3. The question presented for review by this Honorable Court is as follows:

WHETHER THE PETITIONER, DIEGO TRINIDAD, WAS DENIED THE EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE COURT OF FLORIDA REFUSED TO APPLY THE HOLDING OF *STATE V. SARMIENTO*, 371 So.2d 1047 (Fla. 3d DCA 1979) TO HIS CASE, BUT RATHER HELD THAT HIS CASE WAS CONTROLLED BY *FRANCO V. STATE*,

376 So.2d 1168 (Fla. 3d DCA 1979) WHICH THE TRIAL COURT AND THE DISTRICT COURT OF APPEAL HELD TO HAVE SUPERCEDED *SARMIENTO*. WHERE UNDER FLORIDA LAW THE DECISION IN *FRANCO* WAS NOT YET OF PRECEDENTIAL VALUE AT THE TIME IT WAS APPLIED TO THE PETITIONER'S CASE AND WHERE THE SUPREME COURT OF FLORIDA LATER UPHELD AND REVALIDATED *SARMIENTO* AS THE CORRECT STANDARD TO BE APPLIED IN CASES LIKE THE PETITIONER'S.

4. **The facts of the Case:**

On December 6, 1978, Officer Dutko of the Fort Lauderdale Police Department, acting in an undercover capacity, was involved in a narcotics transaction which resulted in arrests being made. DIEGO TRINIDAD was not involved, but one of the individuals involved but not arrested, contacted Officer Dutko later that same day, near midnight.

This individual, Stanchfield, said that he would take Officer Dutko to some people who lived in Miami, who would sell Dutko three kilograms of cocaine. The next morning, December 7, Dutko called Stanchfield and said he was prepared to deal with Stanchfield's friends in Miami.

Stanchfield replied that the meeting between Dutko and Stanchfield's friends would take place somewhere in the Miami area, although the specific address was not mentioned at this time. It was further agreed that

Dutko and Stanchfield would meet at around five or six P.M. at the turnpike exit near the Golden Glades Interchange in northern Dade County. Stanchfield was then to lead them to a location in Miami where the transaction would take place.

Federal agent Foley of the Drug Enforcement Administration was also involved having been present at the time of Officer Dutko's midnight call to Stanchfield. At approximately 4:00 P.M. on December 7, the Fort Lauderdale Police Department actually requested the D.E.A.'s assistance in this case.

In response to this request, Agent Foley met with Fort Lauderdale officers and was told that the location would be near 87th Avenue and Coral Way in Dade County.

Before leaving for Dade County, the Fort Lauderdale officers donned electronic eavesdropping devices known as body bugs. They then went to the prearranged rendevouz site where they met Stanchfield who led them to a Lum's Restaurant in the vicinity of 87th Avenue and Coral Way, where Agent Foley joined them. Foley was to play the part of the money carrier and was so introduced to Stanchfield. He was to remain at a pay phone until called and then to bring the money to pay for the cocaine.

Stanchfield then led the officers to the home of Carlos Pintado at 2675 S.W. 102nd Avenue, shortly after 7:30 P.M. Pintado there showed them a sample of the cocaine.

At about 8:15 P.M. the Petitioner arrived at the residence. He gave the officer a further sample and discussed details of the sale with the officers. He left at 8:30 P.M. to resolve some problems concerning the sale and was to return at 10:00 P.M. The officers also left the residence at 8:30 P.M. The officers then went to a nearby shopping center to wait.

At 10:00 P.M. the officers returned to Pintado's residence. Petitioner returned at 10:30 P.M. with only one half kilogram of cocaine which he then gave to the officers for their inspection.

After performing a field test on the suspect cocaine, the officers gave a coded signal to surveilling officers to prepare to move in and make the arrest. Agent Foley was phoned and told to bring the money as well as being given the coded signal.

One of the Fort Lauderdale officers then opened the front door of the residence. Shortly thereafter, Foley and the surveilling officers entered, arrested the Petitioner and seized the cocaine.

During the first interval in the residence the conversations occurring therein were listened to by Officer Jenkins over the body bug, he testified over defense objections to the incriminating conversations which took place therein. He also testified as to the incriminating conversations which took place when the Petitioner returned at 10:30 P.M.

No warrant or judicial authorization for the use of the body bugs had been obtained, in fact, no attempt

had even been made to do so. According to Officer Dutko, because the exact address where the transaction was to take place was unknown and there wasn't time to get a warrant.

At the hearing on the Motion to Suppress, the surveilling officers testified as to the substance of the monitored conversations and the tape recordings of the conversation were sought to be suppressed. In the middle of the hearing, after a recess, the Court apprised counsel of the decision of the Third District Court of Appeal in *Franco v. State*, 372 So.2d 1168 (Fla. 3d DCA 1979).

Previous to this revelation from the bench, Petitioner's counsel had been relying on the holding in *Sarmiento v. State*, to suppress the admission of the recollections of the monitored testimony and the tapes themselves. The Court indicated that it believed the District Court of Appeal had receded from its holding in *Sarmiento* and that the evidence sought to be suppressed could be lawfully admitted since pursuant to Florida Statutes 934.03(2)(C) the law enforcement officer who was a party to the conversation had consented to the electronic surveillance.

5. The federal question here sought to be reviewed was raised by the Petitioner's Motion to Supress in the trial court (R. 10-11, 15). The Court rules *Sarmiento* inapplicable during the hearing on the Motion to Suppress saying:

> "However, I believe that it is clear that this case is controlling and based on *Franco v. State*,

and *Coachman v. State*, and decided December (sic) 25, 1979, I will deny your Motion to Suppress, and all of it, sir." (T. 128-129)

The issue was raised in the District Court of Appeal in the Brief of Appellant in his Point on Appeal:

> "Whether the Court below committed, reversible error in denying the Defendant's Motion to Suppress testimony of the surveilling officers of the Defendant's statements overheard through 'body bugs' on the undercover officers where the use of said bugs had not been authorized by prior judicial order."

6. **Argument:**

The Petitioner herein, DIEGO TRINIDAD, sought to have suppressed both the testimony of the surveilling officers who listened to the conversations broadcast by the "body bugs" as well as the tapes of such broadcasts.

Petitioner's counsel rested his argument in the main on the case of *Sarmiento v. State*, 317 So.2d 1047 (Fla. 3d DCA 1979), copy contained in Appendix hereto.

Petitioner's counsel relied on two salient points in the *Sarmiento* decision by the District Court of Appeal:

1. "We take it that to 'intercept' a private communication, government agents must necessarily invade one's reasonable expectation of privacy for such is the primary interest which this constitutional

right was designed to protect." *Sarmiento* at 1050, and

2. "In this regard, the law is clear that it is per se 'unreasonable' for government agents to intercept private communications by electronic means without first obtaining a valid intercept warrant if under the circumstances it would have been practicable for the agents to have obtained such a warrant." *Sarmiento* at 1052.

Defense counsel thus established both standing and a standard against which the officers conduct should be tested.

It should be noted that the facts of *Sarmiento* are similar, an officer equipped with a "body bug" enters a private residence and negotiates an illegal drug transaction.

In *Sarmiento* the Third District Court of Appeal held that the seized conversations must be suppressed since there was no attempt to procure a warrant within a four to five hour period. Here we have a much longer period of almost eighteen hours in which the officers knew of the upcoming transaction and yet, made no good faith effort to even attempt to secure a warrant. It was therefore Petitioner's position that the trial court should have applied *Sarmiento* and suppressed the evidence in this case for failure to obtain or to even try to obtain a warrant for the electronic seizure.

The trial court on September 26th, however, dealt a joker to Petitioner's trial counsel in the form of the Third District Court of Appeals decision the *prior* day in *Franco v. State*, 376, So.2d 1168 (Fla. 3d DCA 1979). As set forth in the statement of the facts herein the trial court apprehended *Franco* to mean that the rule of *Sarmiento* concerning the necessity of a warrant in such situations was no longer valid. Therefore, applying the *Franco* holding, that under Chapter 934 all that is needed is the law enforcement officers consent, the Court denied the Motion to Suppress.

The law in Florida is clear. Every decision of a District Court of Appeal carries at the top of its first page the admonishment, "Not final until time expires to file Rehearing Motion and, if filed disposed of." The time for filing of a Motion for Rehearing is fifteen days. Florida Rules of Appellate Procedure, 1977 Revision, Rule 9.330.

Further, the case law is also clear that opinions of Appellate Courts are not final until time for rehearing and disposition thereof, if any, has run and that they have no precedential value until such time has run. *Caldwell v. State*, 232 So.2d 427 (1st DCA 1970). Clearly, Petitioner was under the law required to have his case decided under the standards of *Sarmiento* rather than *Franco* and he was denied the equal protection of the law, since for no rational or sufficient reason another standard was applied to the decision of his case. For the purposes of constitutional analysis, the situation can best be described as follows: Petitioner was a member of a class entitled to have his case decided by the application of Rule "A". Other members of Petitioner's

class, those whose case involved similar fact patterns and which happened before *Franco v. State*, became effective were disposed by the application of Rule "A", i.e., *Sarmiento v. State*, Petitioner was, however, excluded from his rightful membership in the group whose cases should be decided under Rule "A" and was treated as a member of the group whose cases were to be decided under Rule "B", i.e., *Franco v. State*, and this exclusion from group "A" was not on any rational basis and was in fact contrary to existing state decisional law and rules.

Additionally, on January 15, 1981, the Supreme Court of Florida decided *Sarmiento* following granting of a petition for certiorari. In their opinion, *Sarmiento* was enunciated as the correct standard and the theory of *Franco*, that Chapter 934 allowed admission of such evidence was destroyed by the Court holding that Chapter 934 was violative of the Florida Constitution to that extent. As the Florida Supreme Court recognized therein, a state is free as a matter of its own law to impose greater restrictions on police activity than those the United States Supreme Court holds to be necessary upon federal constitutional standards. *Oregon v. Haas*, 420 U.S. 714 (1975), *Cooper v. California*, 386 U.S. 58 (1967). In fact, this Court has encouraged states to adopt as a matter of state law, a higher standard than the federal minimum prescribed by this Court. *Lego v. Twomey*, 404 U.S. 477 (1972), *Johnson v. Louisiana*, 406 U.S. 356 (1977), (Powell, J., concurring), see also, Stepping Into the Breach: Basing Defendant's Rights on State Rather Than Federal Law, 15 American Criminal Law Review 339 (1978).

Petitioner was, therefore, denied the equal protection of the law as it existed at the time of the hearing on his Motion to Suppress and as it exists today pursuant to the Florida Supreme Court's decision in *Sarmiento*.

CONCLUSION

Petitioner prays, therefore, that this Honorable Court grant his Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon James Smith, Attorney General, The Capitol, Tallahassee, Florida, by mail this 23 day of April, 1981.

Max P. Engel, Esq.
1461 N.W. 17 Ave.
Miami, Florida 33125
Telephone: 305/325-1810

/s/ MAX P. ENGEL
MAX P. ENGEL, ESQUIRE

Appendix

IN THE SUPREME COURT OF FLORIDA

TUESDAY, FEBRUARY 24, 1981

DIEGO TRINIDAD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 59,901

District Court of Appeal
3rd District, Case No. 79-2041

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, ACTING C.J., ENGLAND, ALDERMAN and McDONALD, JJ., Concur OVERTON, J., Dissents

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: Nancy E. Ryals
Deputy Clerk

ner
CC: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. James R. Jorgenson, Judge

Gerald D. Hubbart, Esquire
Calvin L. Fox, Esquire

IN THE
DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT
JULY TERM, A.D. 1980
WEDNESDAY, OCTOBER 22, 1980

CASE NO. 79-2041

DIEGO TRINIDAD,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellant having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy
ATTEST:

Clerk District Court of
Appeal, Third District

cc: Hubbart, Pitts & Wilson
Jim Smith

NOTE:
IN THE EVENT A MOTION FOR STAY IS NOT APPLIED FOR, THE MANDATE IN THE ABOVE STYLED CAUSE WILL AUTOMATICALLY ISSUE AFTER THE EXPIRATION OF FIFTEEN DAYS FROM DATE HEREOF *WITHOUT FURTHER NOTICE.*

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President

and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Julian F. SARMIENTO,

Appellant,

v.

The STATE of Florida,

Appellee.

No. 78-455.

District Court of Appeal of Florida,
Third District.

April 17, 1979.

Rehearing Denied June 8, 1979.

Defendant was convicted before the Circuit Court, Monroe County, Bill G. Chappell, J., of unlawful sale of heroin, and he appealed. The District Court of Appeal, Third District, Hubbart, J., held that: (1) state agents' warrantless electronic eavesdropping of conversation between undercover police officer and defendant in his home constituted an "interception" within meaning of state constitutional provision and such interception, when it would have been practicable for officers to have obtained prior intercept warrant, was an "unreasonable interception" within meaning of such provision, and, thus, refusal to suppress testimony relating to that which was heard on electronic monitor was reversible error, and (2) defendant was entitled to cross-examine undercover officer in regard to a recent criminal

investigation of him by the State for purpose of impeaching his testimony.

Reversed and remanded.

1. Searches and Seizures —7(1)

For government agents to "intercept" a private communication, within meaning of state constitutional provision that right to be secure against the unreasonable interception of private communications shall not be violated, the agents must invade one's reasonable expectation of privacy. West's F.S.A.Const. art. 1, §12.

See publication Words and Phrases for other judicial constructions and definitions.

2. Searches and Seizures —7(10)

For purposes of State Constitution provision that right to be secure against the unreasonable interception of private communications shall not be violated, a person has the highest reasonable expectation of privacy when he is in his home. West's F.S.A.Const. art. 1, §12.

3. Criminal Law —394.3, 1169.1(8)
Searches and Seizures —7(1)

State agents' warrantless electronic eavesdropping of conversations between undercover police officer and defendant in his home constituted an "interception" within meaning of state constitutional provision that right to be secure against the unreasonable interception of private communications shall not be violated and such interception, when it was practicable for officers

to have obtained prior intercept warrant, was an "unreasonable interception" within meaning of such provision; and thus refusal to suppress testimony relating to that which was heard on electronic monitor was reversible error. West's F.S.A. §§934.03(2)(c), 934.07, 934.08(3), 934.09; West's F.S.A.Const. art. 1, §12.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law —52

State statute cannot constitutionally alter prior court decision interpreting State Constitution.

5. Telecommunications —496

For purposes of state constitutional provision that "right to be secure against the unreasonable interception of private communications shall not be violated, it is per se "unreasonable" for government agents to intercept private communications by electronic means without first obtaining a valid intercept warrant if under the circumstances it would have been practicable for the agents to have obtained such a warrant. West's F.S.A.Const. art. 1, §12.

See publication Words and Phrases for other judicial constructions and definitions.

6. Witnesses —372(2)

In prosecution for unlawful sale of heroin, defendant was entitled to cross-examine undercover officer in regard to a recent criminal investigation of him by the

State for purpose of impeaching his testimony; fact that grand jury had returned a no true bill against such officer in the investigation did not preclude such a cross-examination, in view of defendant's contention that the charges were dropped as part of an agreement with State that officer would testify against defendant.

On Motion For Rehearing

7. Criminal Law —1133

Argument could not be raised for first time on motion for rehearing.

8. Criminal Law —394.6(3)

Trial court acted properly in entertaining and hearing defendant's motion to suppress at time of criminal trial, though it was asserted that defendant had failed to file written pretrial motion to suppress in trial court. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(h)(4).

Alvin E. Entin and Ronald A. Dion, Miami, Manuel W. James, Key West, for appellant.

Jim Smith, Atty. Gen. and Paul Mendelson, Asst. Atty. Gen., for appellee.

Before HENDRY and HUBBART, JJ., and CHARLES CARROLL (Ret.), Associate Judge.

HUBBART, Judge.

This is a criminal prosecution for unlawful sale of heroin in which the defendant was convicted as charged and sentenced in the Monroe County Circuit Court. The defendant appeals.

I

The central issue presented for review is whether the warrantless electronic eavesdropping by state agents of a conversation between the defendant and an undercover police officer in the privacy of the defendant's home [under circumstances where it was practicable for such agents to have applied for and obtained a prior intercept warrant] constitutes an unreasonable interception of the defendant's private communications in violation of Article I, Section 12, of the Florida Constitution. We hold that the above electronic eavesdropping constitutes such an unreasonable interception and reverse.

A

The facts pertaining to the above issue are as follows. On February 14, 1978, at approximately 5:00-6:00 p.m. Detective Charles Hitchins of the Monroe County Sheriff's Office working as an undercover narcotics officer was at a bar in The Raceway Inn, in Key West, Florida. Also present in the bar was the defendant Julian Sarmiento and a young girl reputed to be living with him. Detective Hitchins had a conversation at the bar with the girl in question to the effect that he was interested in purchasing some heroin. The girl thereupon left and had a conversation with the defendant outside the presence of the detective. She later returned to inform Detective Hitchins that he could make a buy of

heroin at the defendant's house trailer which was located next door at 10:30 p.m. that night. Arrangements were made to meet at that location and time.

Detective Hitchins thereafter notified his superior officer, Detective Joseph Valdez of the Monroe County Sheriff's Office, of the proposed narcotics purchase who in turn alerted other law enforcement officers. Detective Hitchins was thereupon equipped with a hidden electronic "body bug" for the purpose of allowing the surveilling police officers to monitor any conversation Detective Hitchins might have with the defendant in the defendant's house trailer that night. No effort was made by any police officer connected with this case to apply for an intercept warrant for this electronic eavesdropping.

Detective Hitchins later went to the defendant's house trailer as planned with a confidential informer and made a purchase of heroin from the defendant. Several law enforcement officers were stationed nearby outside the house trailer pursuant to a prearranged police plan. Two of these officers, Lt. Robert Santana and Sgt. Carol Key of the Key West Police Department, monitored and overheard certain conversations inside the house trailer by means of the electronic "body bug" worn by Detective Hitchins. The conversations which they overheard in the house trailer tended to establish that the defendant had participated in selling a quantity of heroin to Detective Hitchins.

At trial, the defendant objected to and moved to suppress the testimony of Lt. Santana and Sgt. Key as to what they heard on the electronic monitor relating to the conversations between the defendant and Detective

Hitchins in the defendant's house trailer. He argued that such evidence was inadmissible as constituting an unreasonable interception of private communications because of the failure of the police to obtain a prior intercept warrant for the electronic surveillance in this case. The trial court denied the motion.

The defendant was convicted as charged and sentenced to ten year in the state penitentiary. This appeal follows.

B

Article I, Section 12, of the Florida Constitution provides in relevant part as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against . . . the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, . . . the comunication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence."

Central to invoking the protection of this constitutional right is a determination that there has been an "interception of private communications" by government agents. If so, a second determination must be made as to whether such interception was "unreasonable." If

both prerequisites are met, the above constitutional right has been violated and any evidence obtained in violation of such right is inadmissible in evidence against the victim of the unreasonable interception.

1

Our first task, then, is to determine whether there has been an "interception of private communications" of the defendant by government agents in this case. All agree that the defendant's private communications in his home were overheard through an electronic listening device by government agents. The parties sharply disagree, however, as to whether such electronic eavesdropping can be termed an "interception" in the constitutional sense.

[1, 2] We take it that to "intercept" a private communication, government agents must necessarily invade one's reasonable expectation of privacy for such is the primary interest which this constitutional right was designed to shield. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Huffer v. State*, 344 So.2d 1332 (Fla. 2d DCA 1977). Moreover, a person, such as the defendant herein, has the highest reasonable expectation of privacy when he is in his home for it is this sanctuary of privacy, above all else, that this constitutional privilege was designed to protect. *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961); *Brown v. State*, 62 So.2d 348, 349 (Fla.1952); *Church v. State*, 151 Fla. 24, 9 So.2d 164, 167 (1942); *Jackson v. State*, 87 Fla. 262, 99 So. 548, 549 (1924). We would not be true to the spirit or intent of this constitutional guarantee or its historical antecedents were we to hold otherwise.

[3] In the instant case, it is clear that the defendant had a private conversation in the privacy of his home with an undercover police officer. The defendant without question assumed the risk that this officer might betray the defendant's trust and reveal, as he did, the contents of this conversation to the outside world. That, in our view, is a reasonable risk which any person assumes when he talks to anyone as the speaker has it within his power to gauge whether to take such a risk based on his personal assessment of the person to whom he is talking. As such, there was no invasion of the defendant's reasonable expectation of privacy [and thus no "interception" in the constitutional sense] for the officer to listen to and later testify, as he did, to the content of the defendant's conversation in the home. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966).

In our view, however, the defendant had a reasonable expectation of privacy that no one else was listening to his conversation in the home besides the undercover police officer and the other people present therein. We are unwilling to impose upon our citizens the risk of assuming that the uninvited ear of the state is an unseen and unknown listener to every private conversation which they have in their homes. That is too much for a proud and free people to tolerate without taking a long step down the totalitarian road. The home is the one place to which we can retreat, relax, and express ourselves as human beings without fear that an official record is being made of what we say by unknown government agents at their unfettered discretion. It is here that we most enjoy the serenity

and spontaneity of private life with at times its serious, quiet, intimate, free-wheeling, defiant, frivolous, and even profane discourse which liberates daily life but which few, if any, would want spread on the public record. No free society can long remain free which places such private conversations in the home entirely beyond any constitutional protection. *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961); *United States v. White*, 401 U.S. 745, 468—483, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (Harlan, J. dissenting).

It is for these reasons that this court in *Hajdu v. State*, 189 So.2d 230 (Fla. 3d DCA 1966), held that it was a violation of the Fourth Amendment to the United States Constitution and Section 22 of the Declaration of Rights of the Florida Constitution [the predecessor to Article I, Section 12, Fla.Const.] for government agents to electronically eavesdrop without a warrant on a private conversation between the defendant and an undercover police officer in the privacy of the defendant's home and thereafter to testify in court as to what they overheard. We reaffirm and follow that decision today in holding that such eavesdropping constitutes an "interception" of the defendant's private communications within the meaning of Article I, Section 12, of the Florida Constitution.

[4] The state argues in effect that *Hajdu* is no longer good law because the subsequent passage of

Sections 934.03(2)(c),[1] 934.08(3),[2] Florida Statutes (1977) impliedly overruled this decision by authorizing that electronic eavesdropping conducted in this case. We disagree. These statutes by their express terms do not apply to electronic eavesdropping in the home, as here, and cannot be read to overrule or supersede *Hajdu*. Moreover, it is axiomatic that a state statute cannot constitutionally alter a prior court decision interpreting the state constitution. We therefore decline the state's invitation to interpret these statutes to apply to the home so as to overrule *Hajdu*. *Corn v. State*, 332 So.2d 4, 8 (Fla. 1976). That decision was sound when rendered, has not been overruled by the above statutes, and is still good law.

2

Our next task is to determine whether the interception of the defendant's private communications

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[1]"It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act." §934.03(2)(c). Fla.Stat. (1977).

[2]"Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the state or of the United States in any grand jury proceedings, or in any investigation or proceeding in connection with the judicial qualifications commission, if such testimony is otherwise admissible." §934.08(3), Fla.Stat. (1977).

in his home was "unreasonable." It is axiomatic that to intercept private communications whether in the home or elsewhere by invading a person's reasonable expectation of privacy does not alone amount to a violation of Article I, Section 12, of the Florida Constitution. As with traditional searches and seizures, it is not all interceptions of private communications which are forbidden by the constitution, but only "unreasonable" interceptions. See *Elkins v. United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

[5] In this regard, the law is clear that it is per se "unreasonable" for government agents to intercept private communications by electronic means without first obtaining a valid intercept warrant if under the circumstances it would have been practicable for the agents to have obtained such a warrant. *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Tollett v. State*, 272 So.2d 490 (Fla. 1973); *State v. Muscara*, 334 So.2d 167 (Fla. 3d DCA 1976). Article I, Section 12, of the Florida Constitution lays out the constitutional requirement for such intercept warrants which are in turn implemented by Sections 934.07, 934.09, Florida Statutes (1977). Indeed, where a valid intercept warrant has been obtained, electronic interceptions of private communications have been sustained as reasonable. *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966).

In the instant case, the electronic interception employed by the police officers herein was accomplished without benefit of a prior intercept warrant. The state makes no contention that it was not practicable under the circumstances for the police to have applied for and

obtained such a warrant. Indeed, the police had between 4-5 hours to do so between Detective Hitchins' meeting at The Raceway Inn and the ultimate meeting in the defendant's house trailer. The failure to obtain such a warrant under these circumstances makes the electronic interception herein "unreasonable" within the meaning of Article I, Section 12, of the Florida Constitution. *State v. Muscara*, 334 So.2d 167 (Fla. 3d DCA 1976).

The trial court accordingly committed reversible error in denying the defendant's motion to suppress the testimony of Lt. Santana and Sgt. Key who electronically eavesdropped on the defendant's private conversations and testified at trial as to the content thereof. The conviction herein must be reversed and the cause remanded for a new trial.

II

[6] In view of our disposition of this case, it is unnecessary to consider the defendant's Richardson violation contention as the point is unlikely to arise upon retrial. The defendant's final contention, however, raises an issue which may arise upon retrial and we therefore must reach it.

In our view, the trial court committed reversible error in improperly restricting the defendant's cross-examination of Detective Charles Hitchins by precluding the defendant from inquiring into a recent criminal investigation of the detective by the state. This result is not changed by the fact that the Monroe County Grand Jury returned a no true bill against the detective in such investigation as it is the defendant's contention

that the charges were dropped as part of an agreement with the state that the detective would testify against the defendant in this case. The defendant is entitled to inquire into such matters before the jury in an effort to impeach Detective Charles Hitchins' testimony as a witness. *Stripling v. State*, 349 So.2d 187, 191 (Fla. 3d DCA 1977); *Morrell v. State*, 297 So.2d 579 (Fla. 1st DCA 1974).

The judgment of conviction and sentence entered against the defendant herein is reversed and the cause remanded to the trial court for a new trial to be conducted in conformance with the views expressed in this opinion.

Reversed and remanded.

Before HENDRY and HUBBART, JJ., and CHARLES CARROLL (Ret.), Associate Judge.

ON MOTION FOR REHEARING

PER CURIAM.

[7] The state has filed a motion for rehearing in this cause raising as a ground therefor that the court overlooked or failed to consider that the defendant did not file a written pre-trial motion to suppress in the trial court and that the failure to do so was sufficient basis for the trial court to deny the motion. That argument, however, was never raised by the state either in its main brief or on oral argument in this cause and was in no way overlooked by this court. It cannot, therefore, be raised for the first time on a motion for rehearing.

Nelson v. Selden Cypress Door Co., 78 Fla. 203, 83 So. 286 (1919); *Cartee v. The Florida Department of Health & Rehabilitative Services*, 354 So.2d 81, 83 (Fla. 1st DCA 1977); *Price Wise Buying Group v. Nuzum*, 343 So.2d 115, 117 (Fla. 1st DCA 1977).

[8] Moreover, our review of the record reveals that the trial court properly entertained and heard the defendant's motion to suppress at the time of trial. *Davis v. State*, 226 So.2d 257 (Fla. 2d DCA 1969); Fla.R.Crim.P. 3.190(h)(4). The state did not object to or contest the defendant's right to make this motion in the trial court. It is too late now for the state to raise the issue.

We have considered the other grounds urged on the motion for rehearing and find them to be without merit. The motion for rehearing is, accordingly, denied.

Diego TRINIDAD,

Appellant,

v.

The STATE of Florida,

Appellee.

No. 79-2041.

District Court of Appeal of Florida,
Third District.

Sept. 16, 1980.

Rehearing Denied Oct. 22, 1980.

Defendant was convicted before the Dade County Circuit Court, James R. Jorgenson, J., of a narcotics offense, and he appealed. The District Court of Appeal, Schwartz, J., held that testimony of police officers who overhead defendant's drug-related conversations with an undercover officer equipped with a "body bug" for which an intercept warrant had not been obtained was properly admitted, since the subject conversation did not take place in defendant's home but in the "residence" of a codefendant; furthermore, the admission of the testimony of the officers who were outside the house could have been no more than harmless error, since it merely corroborated that of the undercover man, who himself related his transaction with the defendant and whose credibility and interest was not challenged below.

Affirmed.

Criminal Law —394.13, 1169.2(5)

Testimony of police officers who overheard defendant's drug-related conversations with an undercover officer equipped with a "body bug" for which an intercept warrant had not been obtained was properly admitted, since the subject conversation did not take place in defendant's home but in the "residence" of a codefendant; furthermore, the admission of testimony of the officers who were outside the house could have been no more than harmless error, since it merely corroborated that of the undercover man, who himself related his transaction with the defendant and whose credibility and interest was not challenged below. West's F.S.A. §§59.041, 924.33.

Hubbart, Pitts & Wilson and Gerald D. Hubbart, Miami, for appellant.

Jim Smith, Atty. Gen. and Calvin L. Fox, Asst. Atty. Gen., for appellee.

Before BARKDULL, HENDRY and SCHWARTZ, JJ.

SCHWARTZ, Judge.

Relying on *Sarmiento v. State*, 371 So.2d 1047 (Fla.3d DCA 1979), cert. granted and pending, Fla.Sup.Ct., Case No. 57,173, the appellant-defendant contends that the trial judge should have suppressed the testimony

of police officers who overheard his drug-related conversations with an undercover officer equipped with a "body bug" for which an intercept warrant had not been obtained. Even assuming the continuing viability of *Sarmiento* as to its own fact, see contra, *State v. Scott*, 385 So.2d 104 (Fla. 1st DCA 1980), we find that the case closer to and is controlled instead by *Franco v. State*, 376 So.2d 1168 (Fla.3d DCA 1979), cert. denied, 386 So.2d 636 (Fla. 1980). This is so because the conversation in question did not take place in the defendant's home but in the "residence" of a codefendant. See also, *Preces v. State*, 378 So.2d 77 (Fla.3d DCA 1979).

Furthermore, the admission of the testimony of the officers who were outside the house could have been no more than harmless error, since it merely corroborated that of the undercover man, who himself related his transaction with the defendant. §§59.041, 924.33, Fla.Stat. (1979). In this respect, too, the case is dissimilar to *Sarmiento*. Unlike the undercover policeman involved in that case, the credibility and interest of the officer who testified in this one was not challenged below.

Affirmed.[1]

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[1]We reached the same conclusion in a recent case involving virtually identical facts and contentions. *Turnbull v. State*, 386 So.2d 42 (Fla.3d DCA 1980).

Albert Louis FRANCO and Oliver Eugene Coachman,

Appellants,

v.

The STATE of Florida,

Appellee.

Nos. 78-299, 78-300.

District Court of Appeal of Florida, Third District.

Sept. 25, 1979.

Defendants were convicted in the Circuit Court, Dade County, Wilkie D. Ferguson, Jr., J., of perjury, and they appealed. The District Court of Appeal, Haverfield, C. J., held that electronic recordings of conversations which were obtained from defendants by federal police officer without an intercept warrant and which concerned statements made by defendants to effect that they gave narcotics to confidential informants in exchange for information were admissible in perjury prosecution for falsely testifying before grand jury with respect to those statements where fellow police officer took witness stand and testified as to his consent to recording of conversations and contents thereof prior to actual introduction of recordings.

Affirmed.

Hubbart, J., dissented and filed opinion.

1. Criminal Law —1222

The use of secret informers by the government is not per unconstitutional. West's F.S.A.Const. art. 1, §12; West's F.S.A. §934.03(2)(c).

2. Searches and Seizures —7(1)

The Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. U.S.C.A. Const. Amend. 4.

3. Criminal Law —394.3

The participant in a communication must himself take the witness stand and testify that he gave his consent to the interception as a predicate to the introduction of the electronic reproduction of the communication. West's F.S.A.Const. art. 1, §12; West's F.S.A. §934.03(2)(c).

4. Criminal Law —394.3

Electronic reproductions of communications between an informer and accused may be introduced in evidence on compliance with statutory requirements and securance of an intercept warrant or order are not necessary regardless of whether there was sufficient time to obtain one. West's F.S.A.Const. art. 1, §12; West's F.S.A. §934.03(2)(c).

5. Criminal Law —412(1)

A wrongdoer who voluntarily speaks to another of his wrongdoings only has the hope or expectation, not a constitutionally protected right, that the other person will not breach his confidence and testify as to the contents of their conversations. West's F.S.A.Const. art. 1, §12; West's F.S.A. §934.03(2)(c).

6. Criminal Law —394.3

Recordings of communications should be and are admissible after individual in whom accused has confided has testified both as to his consent and the contents of his discussion; disapproving *State v. Muscara*, 334 So.2d 167. West's F.S.A.Const. art. 1, §12; West's F.S.A. §934.03(2)(c).

7. Criminal Law —394.3

Electronic recordings of conversations which were obtained from defendants by federal police officer without an intercept warrant and which concerned statements made by defendants to effect that they gave narcotics to confidential informants in exchange for information were admissible in perjury prosecution for falsely testifying before grand jury with respect to those statements where fellow police officer took witness stand and testified as to his consent to recording of conversations and contents thereof prior to actual introduction of recordings. West's F.S.A.Const. art. 1, §12; West's F.S.A. §934.03(2)(c).

Stephen J. Kogan, Miami and Corey E. Hoffman, South Miami, for appellants.

Jim Smith, Atty. Gen. and Steven R. Jacob, Asst. Atty., Gen., for appellee.

Before HAVERFIELD, C. J., and HUBBART and KEHOE, JJ.

HAVERFIELD, Chief Judge.

Police officers Oliver Coachman and Albert Franco appeal their convictions for perjury for falsely testifying before a grand jury that they did not give drugs to confidential informants in exchange for information.

They first contend that the trial court erred in admitting into evidence electronic recordings of their conversations which were obtained without an intercept warrant.

Deputy John Leskin was one of several Broward County police officers that had observed officers Coachman and Franco deliver narcotics to two confidential informants in May, 1976. In June, 1976 Leskin was called to the Dade County State Attorney's office which was investigating Franco and Coachman for alleged improprieties. On Novembver 10, at the request of the investigator for the State's Attorney, Leskin held a telephone conversation with Franco with reference to Franco giving narcotics to confidential informants. This conversation was recorded with the consent of Deputy Leskin. On November 11 Leskin again called Franco

and arranged for a personal meeting. Leskin, wired for sound, met later that same day with Franco and Coachman and the conversation at the meeting as well as the telephone conversation earlier that day were recorded. At trial Leskin testified that he consented to have his conversations with Franco and Coachman recorded and further testified as to the contents of these conversations. The tapes of the conversations were then introduced into evidence and played for the jury. In these recorded conversations Franco and Coachman stated that they did give narcotics to confidential informants in exchange for information. Franco and Coachman argue that the prosecution was required to obtain intercept warrants before the conversations could be recorded and, therefore, the tapes were not admissible. We do not agree.

[1-3] The law is well established that the use of secret informers by the government is not per se unconstitutional and the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 347 (1966); see also *Walker v. State*, 222 So.2d 760 (Fla. 3d DCA 1969) and cases cited therein. The above principle is applicable to Article I, Section 12 of the Florida Constitution (1968) and is codified in Section 934.03(2)(c), Florida Statute (1975):

> "(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when

such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."

However, *Tollett v. State*, 272 So.2d 490 (Fla.1973), the lead case with respect to the right of privacy protected by Article I, Section 12, requires that in keeping with the intent thereof the participant in a communication must himself take the witness stand and testify that he gave his consent to the interception as a predicate to the introduction of the electronic reproduction of the communication. As the court explained:

> "This is so because it is an elementary rule of evidence that a party to a discussion or communication with a defendant may take the witness stand and testify, subject to cross-examination, as to the contents of his communication or discussion with a defendant and this can include as a logical concomitant to his testimony any tape or electronic recordings of such communications or discussions which he himself made or which he authorized (consented for) police officers to make. Such direct testimony easily falls in the class of those exceptions where establishment of probable cause and securance of a warrant or order are not required." 272 So.2d 494.

[4-6] It is clear that if there is compliance with Section 934.03(2)(c) and *Tollett*, supra, electronic reproductions of communications between an informer and the accused may be introduced into evidence and

the securance of an intercept warrant or order are not necessary regardless of whether there was sufficient time to obtain one. A wrongdoer who voluntarily speaks to another of his wrongdoings, only has the hope or expectation, not a constitutionally protected right, that the other person will not breach his confidence and testify as to the contents of their conversations. It logically follows then that recordings of such communications should be and are admissible after the individual in whom the accused has confided has testified (both as to his consent and the contents of his discussion) in that in the search for the truth it is by far the most reliable evidence possible. See *Walker v. State*, 222 So.2d 760, 762 (Fla. 3d DCA (1969), *supra*. Conceivably these recordings may ultimately be favorable to the accused as the informer's testimony may not accurately reflect the conversations or quote statements out of context.

Finally to the extent that our holding herein may conflict with *State v. Muscara*, 334 So.2d 167 (Fla. 3d DCA 1976), we hereby recede from *Muscara*.

[7] Turning to the instant case, the record reflects that Deputy Leskin took the witness stand and testified as to his consent to taping the conversations and then the contents thereof prior to the actual introduction of the tapes. For the reasons set out above we conclude the tapes were admissible. See *Crespo v. State*, 350 So.2d 507, 509 (Fla. 3d DCA 1977).

We also considered the second point on appeal and find no merit therein. See *U.S. v. Gregono*, 497 F.2d 1253 (4th Cir. 1974).

Affirmed.

HUBBART, Judge (dissenting).

I must respectfully dissent. I would reverse the convictions appealed from and remand the cause to trial court with directions to order a new trial and to grant the defendants' motion to suppress the tape recordings herein for failure of the police to obtain a valid intercept warrant based on the authority of *State v. Muscara*, 334 So.2d 167 (Fla. 3d DCA 1976).

It seems clear from this record, and the court herein does not reach a contrary result, that the police had ample time to secure an intercept warrant prior to conducting the electronic surveillance in this case. All the taped conversations with the defendants herein were initiated by the police after a lengthy police investigation during which time there was more than a sufficient opportunity to have secured an intercept warrant.

In *State v. Muscara*, supra, this court held that the failure to secure an intercept warrant to electronically record, as here, a conversation between the defendant and a consenting police informer, under circumstances where it was practicable for the police to have secured such a warrant, rendered the electronic interception of such conversations "unreasonable" and the tape recordings thereof inadmissible in evidence within the meaning of Article I, Section 12, of the Florida Constitution. The result reached in *Muscara* was in no way changed by the fact that the police informer who participated in the conversation consented, as here, to the electronic

surveillance of such conversation. The fact remains that the defendant did not consent to such interception and the police informer can in no sense be held to be the defendant's agent for the purpose of waiving his right to be free from unreasonable interceptions of private communications under Article I, Section 12 of the Florida Constitution. See *Silva v. State*, 344 So.2d 559 (Fla.1977). To the extent that *Crespo v. State*, 350 So.2d 507 (Fla. 3d DCA 1977), conflicts with *Muscara*, I would recede from *Crespo*.

Mr. Justice Brennan in his dissenting opinion in *Lopez v. United States*, 373 U.S. 427, 475-490, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963), which was adopted in part in *Osborn v. United States*, 385 U.S. 323, 87 C.Ct. 429, 17 L.Ed.2d 394 (1966), states the classic position as to why electronic eavesdropping of the kind conducted in this case should receive Fourth Amendment protection. This position was further amplified by Mr. Justice Harlan in his dissenting opinion in *United States v. White*, 401 U.S. 745, 768-795, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). Although these views have not entirely prevailed insofar as an interpretation of the Fourth Amendment, the position taken therein has prevailed in this state in the *Muscara* decision as an interpretation of Article I, Section 12 of the Florida Constitution. It is settled federal constitutional law that a state may give its citizens greater protection under its state constitutional provision on unreasonable searches and seizures than that afforded by the Fourth Amendment. *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

I would afford our citizens greater rights under Article I, Section 12 of the Florida Constitution than

that afforded by the Fourth Amendment based on the above authorities. In my view, a person should have a reasonable expectation of privacy whenever he talks to another person that a verbatim tape recording is not being made of the conversation. I think it is too great a burden to place on our citizens the risk of assuming that whoever they talk to is tape recording verbatim everything that is being said. Certainly a person takes a risk that whoever he talks to will breach a confidence and repeat it to the outside world. That is a far cry, however, from tape recording the entire conversation and playing it for the outside world. To sanction such electronic surveillance as lying entirely beyond any constitutional protection is, in my view, to impose a chilling effect on the right of free speech. Our private conversations with others are at times punctuated with serious, quiet, intimate, freewheeling, defiant, frivolous, and even profane discourse. It liberates our daily lives, but few, if any, would want such conversations spread on the public record. To sanction the electronic eavesdropping approved in this case is to place such conversations on the public record uncontrolled by any constitutional limitation. I think there is a fundamental qualitative difference between a police informer orally repeating a conversation with another person, and a police informer playing a tape recording which he has clandestinely made of the same conversation. The former is a breach of confidence which I think our citizens can live with; the latter is, in my view, a serious invasion of one's reasonable expectation of privacy which is the core value that Article I, Section 12 of the Florida Constitution was designed to protect. *Sarmiento v. State*, 371 So.2d 1047 (Fla. 3d DCA 1979); *Huffer v. State*, 344 So.2d 1332 (Fla. 2d DCA 1977).

This is not to say that the police may not electronically monitor conversations between a police informer and a criminal suspect consistent with our constitution where there is good reason to believe that the suspect in question is violating the law. If that showing is made to a magistrate and a valid intercept warrant is issued, I find no objection whatever to the electronic interception which was accomplished in this case as this would be a reasonable interception. Article I, Section 12 of the Florida Constitution does not prohibit all interceptions of private communications, but only "unreasonable" interceptions. My objection, consistent with the *Muscara* decision, is that the interception in this case was accomplished without the benefit of a valid intercept warrant, under circumstances where it was practicable to have obtained one, and was thus an "unreasonable" interception within the meaning of Article I, Section 12 of the Florida Constitution.

I see nothing in *Tollett v. State*, 272 So.2d 490 (Fla.1973), which states as a contrary rule. In that case, the court did not hold that electronic surveillance of a private conversation with a consenting police informer is constitutional even though it would have been practicable under the circumstances for the police to have obtained a prior intercept warrant for such surveillance. The court was not presented with that issue and, accordingly, did not pass on it. If anything, the language of the opinion appears to announce a decided preference for intercept warrants as the normal method by which governmental electronic surveillance should be conducted.

I recognize that Section 934.03(2)(c), Florida Statutes (1975), tracks prior electronic eavesdropping law before

1968 and, as interpreted, places beyond the scope of the electronic eavesdropping statute any electronic interceptions of a conversation outside the home between two or more people where one of the parties consents to the conversation. *Sarmiento v. State*, 371 So.2d 1047 (Fla. 3d DCA 1979). That statute, however, does not and cannot constitute an authoritative interpretation of Article I, Section 12 of the Florida Constitution which went into effect in 1968, and, to the extent that the statute conflicts with the constitution, the statute is inoperative. *Brown v. City of Lakeland*, 61 Fla. 508, 54 So. 716 (1911).

I would reverse and remand as indicated above.

Criminal Law — Search and Seizure — Expectation of Privacy — Intercepted Communications — Warrantless Electronic Interception of Conversation Between Defendant and Police Officer in Defendant's Residence is Illegal.

Case No. 57,173

STATE OF FLORIDA,

Petitioner,

v.

JULIAN F. SARMIENTO,

Respondent,

January 15, 1981. Certiorari to the District Court of Appeal, Third District. Jim Smith, Attorney General, and Paul Mendelson, Assistant Attorney General, Miami, Florida, for Petitioner. Alvin E. Entin and Mark L. Angert of the Law Offices of Alvin E. Entin, North Miami Beach, Florida; and Clyde M. Taylor, Jr. of Dickinson, Levy and Taylor, Tallahassee, Florida, for Respondent.

(PER CURIAM.) We have for review the decision of the District Court of Appeal, Third District, in Sarmiento v. State, 371 So.2d 1047 (Fla. 3d DCA 1979), which conflicts with Franco v. State, 376 So.2d 1168 (Fla. 3d DCA 1979). The issue we address is whether the warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home is an unreasonable interception of defendant's private communications in violation of article I, section 12, Florida Constitution. Jurisdiction vests in this Court pursuant to Art. V, Section 3(b)(3), Florida Constitution (1971).

Closely paraphrased from the district court opinion, the pertinent facts follow. On February 14, 1978, Detective Charles Hitchins of the Monroe County Sheriff's Office, working as an undercover narcotics officer, was at a bar in Key West, Florida. Also present in the bar were defendant Julian Sarmiento and a young girl reputed to be living with him. Detective Hitchins told Sarmiento's girlfriend that he was interested in purchasing some heroin. The girl thereupon left and had a conversation with defendant outside the presence of the detective. She later returned to inform Detective Hitchins that he could make a buy of heroin at the defendant's house trailer which was located next door at 10:30 p.m. that night. Arrangements were made to meet at that location and time.

Detective Hitchins thereafter notified his superior officer of the proposed narcotics purchase who in turn alerted other law enforcement officers. Detective Hitchins was equipped with a hidden electronic "body bug" for the purpose of allowing the surveilling police officers to monitor any conversation Detective Hitchins might have with defendent in the defendant's house trailer that night. No effort was made by any police officer connected with this case to apply for an intercept warrant for the electronic eavesdropping.

Detective Hitchins later went to the defendant's house trailer as planned with a confidential informer and made a purchase of heroin from the defendant. Several law enforcement officers were stationed nearby outside the house trailer pursuant to a prearranged police plan. Two of these officers monitored and overheard certain conversations inside the house trailer by means of the electronic "body bug" worn by Detective Hitchins.

The conversations overheard in the house trailer tended to establish that the defendant had participated in selling a quantity of heroin to Detective Hitchins.

At trial, defendant objected to and moved to suppress the testimony of the police officers as to what they heard on the electronic monitor relating to the conversations between defendant and Detective Hitchins in the defendant's house trailer. He argued that such evidence was inadmissible as constituting an unreasonable interception of private communications because of the failure of the police to obtain a prior intercept warrant for the electronic surveillance in this case. The trial court denied the motion. The defendant was convicted as charged and sentenced to ten years in the state penitentiary.

The district court reversed, holding that the electronic interception of the conversation in the trailer was unreasonable and violative of article I, section 12. For the following reasons we approve the district court's decision.

Article I, section 12 of the Florida Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects against . . . the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, . . . the communication to be intercepted, and the nature of evidence to be

> obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

The district court correctly analyzed that the definition of "interception of private communications" is a function of one's reasonable expectation of privacy. Katz v. United States, 389 U.S. 347 (1967). The court also correctly concluded that

> [t]he defendant without question assumed the risk that this officer might betray the defendant's trust and reveal, as he did, the contents of this conversation to the outside world. That, in our view, is a reasonable risk which any person assumes when he talks to anyone as the speaker has it within his power to gauge whether to take such a risk based on his personal assessment of the person to whom he is talking. As such, there was no invasion of the defendant's reasonable expectation of privacy [and thus no "interpretation" in the constitutional sense] for the officer to listen to and later testify, as he did, to the content of the defendant's conversation in the home.

371 So.2d at 1050.

But what makes the issue before us different from the situation above is that Sarmiento did enjoy a reasonable expectation of privacy that no one else was listening to the conversation in the home besides the undercover police officer and others present therein. To assume the risk that one who participates in a conversation held in the home might later reveal the

contents of that conversation is one thing, but to assume the risk that uninvited and unknown eavesdroppers might clandestinely participate in that conversation and later reveal its contents is another, and indeed proves too much. We echo Judge Hubbart's sentiments:

> We are unwilling to impose upon our citizens the risk of assuming that the uninvited ear of the state is an unseen and unknown listener to every private conversation which they have in their homes. That is too much for a proud and free people to tolerate without taking a long step down the totalitarian road. The home is the one place to which we can retreat, relax, and express ourselves as human beings without fear that an official record is being made of what we say by unknown government agents at their unfettered discretion.

Id. at 1051.

We further concur, for the reasons expressed in the district court opinion, that the interception of Sarmiento's conversation in his home was "unreasonable."

Our colleague in dissent contends vigorously that the Florida Legislature recognizes the right of a police officer to intercept an oral communication when such person is a party to the conversation or where one of the parties to the communication has given prior consent to the interception. Sec. 934.03(2)(c), Fla.Stat. (1977). Our response to this contention is simple; insofar as that statute authorizes the warrantless interception of a private conversation conducted in the home, it is unconstitutional and unenforceable. Our colleague

continues that the United States Supreme Court has held that the Federal Constitution permits the type of electronic interception found here. But surely he would concede that the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution. A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry. The criminal justice system must protect the rights of the innocent as swiftly and as certainly as it punishes the guilty, lest it impinge upon the rights of those whom it, with good intentions, seeks to protect.

Accordingly, the petition for writ of certiorari is granted, and the decision of the District Court of Appeal, Third District is approved.

It is so ordered. (Sundberg, C.J., Adkins, Overton, England and McDonald, JJ., Concur. Alderman, J. Dissents with a opinion, with which Boyd, J., concurs.)

ALDERMAN, J., dissenting.

I cannot agree that Sarmiento's rights under article I, section 12, were violated by the interception of his conversation with the undercover detective by way of a monitoring device. In monitoring the conversation, the police were acting in accordance with section 934.03(2)(c). They were monitoring the conversations not only to obtain corroborating evidence but also for the protection of the undercover agent.

Sarmiento expressly concedes that he had no reasonable expectation of privacy concerning his

communications with the detective insofar as the possibility that the detective would disclose the contents of their conversation. He also concedes he had no reasonable expectation of privacy concerning the possibility that the detective would record the conversation by means of a recorder on his person or a recorder outside the premises. He only asserts that he had a reasonable expectation of privacy that his conversation would not be heard by others outside his home by means of a monitoring device. I find it incredible and untenable to say that although Sarmiento had no initial expectation of privacy in the communications, he had a resonable expectation of privacy from the police officers merely monitoring the conversation by means of a body bug carried by the undercover agent who had consented to the interception.

The Supreme Court of the United States has held that a defendant does not have a justifiable and constitutionally protected expectation that a person with whom he is conversing will not reveal the conversation to the police either then, by means of electronic equipment, or later. United States v. White, 401 U.S. 745 (1970); Hoffa v. State, 385 U.S. 293 (1966).

The Supreme Court, in United States v. White, addressed the issue of whether the fourth amendment bars from evidence the testimony of governmental agents who related certain conversations which had taken place between White and an informant and which the officers had overheard by monitoring the frequency of a radio transmitter carried by the informant. In holding that this evidence should not be barred, it considered what expectation of privacy on the part of a criminal

defendant is justifiable and reiterated its holding in Hoffa that no matter how strongly a defendant trusts an apparent colleague, his expectations in this respect are not protected by the fourth amendment when it happens that his colleague is a government agent reporting regularly to the authorities. The Court explained:

> In these circumstances, "no interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States, at 302. No warrant to "search and seize" is required in such circumstances, nor is it when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused. Lewis v. United States, 385 U.S. 206 (1966), or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence. Lopez v. United States, 373 U.S. 427 (1963).
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> . . . .
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> Concededly a police agent who conceals his police connections may write down for official use his conversation with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without

> otherwise violating the latter's Fourth Amendment rights. Hoffa v. United States, 385 U.S., at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person. Lopez v. United States, supra; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency . . . .

401 U.S. at 749-51.

The Supreme Court further determined that, since the fourth amendment gives no protection to the wrongdoes who trusted an accomplice who is or becomes a police agent, it does not protect him when that same agent has recorded or transmitted the conversations which are later offered into eivdence to prove the State's case. The Court found it untenable to say, on the one hand, that the activities and reports of the undercover police agent were a reasonable investigative effort and not in violation of the fourth amendment and, on the other hand, that the same agent, carrying a recorder or transmitter, conducted an unreasonable and unconstitutional search and seizure. It held that no different result should be reached and that neither situation violates the fourth amendment.

More recently, in United States v. Caceres, 440 U.S. 741 (1979), the Supreme Court reaffirmed its position

in White that no fourth amendment rights are violated by an undercover agent carrying radio equipment which transmitted the conversations with defendant to either recording equipment or to officers monitoring the transmitting frequency. The Court held that "[n]either the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." [Footnote omitted.] 440 U.S. at 744.

The Florida legislature expressly recognizes the right of a law enforcement officer to intercept an oral communication when such person is a party to the conversation or where one of the parties to the communication has given prior consent to such interception and the purpose of the interception is to obtain evidence of a criminal act. Section 934.03(2)(c).

In the present case, the monitoring of the conversation was consistent with Florida law and was not a violation of the fourth amendment or article I, section 12, Florida Constitution. In State v. Scott, 385 So.2d 1044 (Fla. 1st DCA 1980), the First District accurately pointed out:

> It is now well-established in Florida law that the above constitutional prohibition [article I, section 12, Florida Constitution] against the "unreasonable interception of private communications" may be satisfied either by obtaining a warrant (under Section 934.07), or by assuring that one of the parties to the communication has given prior consent to the

> interception, and, if consent is relied upon, such consent is evidenced by the testimony of the consenting party, subject to cross-examination, as a condition precedent to the introduction of the recording into evidence. Tollett v. State, 272 So.2d 490 (Fla. 1973); and Franco v. State, 376 So.2d 1168 (Fla. 3rd DCA 1979).

385 So.2d at 1046.

I note with interest that the Third District, in decisions rendered subsequent to the present decision under review, has retreated to some extent from its decision in Sarmiento. Franco v. State, 376 So.2d 1168 (Fla. 3d DCA 1979), involved the admissibility of recordings of conversations with the consent of a law enforcement officer who has a participant in the conversations. Therein, the district court held:

> The law is well established that the use of secret informers by the government is not per se unconstitutional and the Fourt Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reavel it. Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 347 (1966); see also Walker v. State, 222 So.2d 760 (Fla. 3d DCA 1969), and cases cited therein. The above principle is applicable to Article I, Section 12 of the Florida Constitution (1968), and is codified in Section 934.03(2)(c), Florida Statutes (1975):

> "(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."

376 So.2d at 1169-70. Judge Hubbart, who authored Sarmiento, dissented from Franco on the basis that the recording was a prohibited invasion of Franco's rights under article I, section 12, Florida Constitution.

In its subsequent decision of Trinidad v. State, No. 79-2041 (Fla. 3d DCA Sept. 16, 1980), the Third District questioned the viability of its decision in Sarmiento in light of State v. Scott.

I find that Sarmiento's rights under article I, section 12, Florida Constitution, and the fourth amendment to the United States Constitution were not violated when the officers monitored the conversation between the defendant and the undercover detective. Accordingly, I would quash the decision of the district ourt insofar as it holds that the testimony of the monitoring police officers was inadmissible. (Boyd, J., Concurs).

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